NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2007 CA 0369

RINA M. PALMER, CHARLES B.W. PALMER AND CHARLES B.W. PALMER, III

VERSUS

STATE OF LOUISIANA, THROUGH THE DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT, B&C ASPHALT, BRYAN BOSSIER, DIAMOND B. CONSTRUCTION COMPANY, INC., W.R.CORE, INC. AND GARY R. CORE, PRESIDENT OF W.R. CORE, INC.

Judgment Rendered: February 8, 2008

* * * * * * * * * *

Appealed from the
Twenty-First Judicial District Court
In and for the Parish of Tangipahoa
State of Louisiana
Docket Number 9201996

Honorable Ernest Drake, Judge Presiding

* * * * * * * * * *

Charles B.W. Palmer **Amite, LA**	**Counsel for Plaintiffs/Appellants,** **Rina M. Palmer, Charles B.W. Palmer, and Charles B.W. Palmer, III**
Duncan Kemp, III **Hammond, LA**	**Counsel for Defendant/Appellee,** **DOTD**
Assistant Attorney General **David E. Marquette** **Baton Rouge, LA**	
Thomas B. Waterman **Ponchatoula, LA**	**Counsel for Defendant/Appellee,** **Julian Dufreche, 21st JDC Clerk of Court**

BEFORE: WHIPPLE, GUIDRY, AND WELCH, JJ.

Guidry, J. concurs in the result.
Welch, J. concurs in part and dissents in part with reasons.

WHIPPLE, J.

Plaintiffs, Rina Palmer, Charles B.W. Palmer, and Charles B.W. Palmer, III, seek to appeal from an adverse judgment of the trial court dismissing their claims against defendant, State of Louisiana through the Department of Transportation and Development (the DOTD), arising from a single-car accident on August 25, 1991. Also before us is a motion filed by the DOTD seeking to dismiss the appeal as untimely and a motion to supplement the appeal record filed by plaintiffs. At the outset, we will address the pending motions.

PROCEDURAL HISTORY[1]

On July 5 and 6, 2000, this matter proceeded to a bench trial on the merits of plaintiffs' claims against the DOTD.[2] At the conclusion of the plaintiffs' case, the DOTD moved for an involuntary dismissal of plaintiffs' claims in accordance with LSA-C.C.P. art. 1672. The trial court granted the motion in open court on July 6, 2000, and a written judgment ordering involuntary dismissal was signed by the trial court on July 10, 2000.

On July 18, 2000, plaintiffs filed a document purporting to be a motion for new trial, contending as follows:

> The plaintiffs are aggrieved by the judgment and respectfully move the Court for a new trial. Plaintiffs submit that the judgment is contrary to the law an[d] evidence presented. Moreover, it is submitted that the defendant suppressed evidence both during discovery and trial that obviously was prejudicial to its cause. By virtue of testimony adduced during the trial proceedings, plaintiffs are confident that certain new evidence exists that is material to their

---

[1]This case has had an extensive procedural history, since the accident at issue occurred on August 25, 1991. For brevity, we limit our discussion to the relevant procedural history.

[2]Plaintiffs had previously settled with defendants, Diamond B Construction Company, B&C Asphalt, W.R. Core, Inc., and Brian Bossier. A motion and order of partial dismissal, dismissing with prejudice plaintiffs' claims against those defendants was filed on August 20, 1999.

> cause that can only be brought to the Court's attention via a new trial on the merits.[3]

However, no contradictory hearing or service was requested. After eventually learning that this purported "motion" had been filed, on October 21, 2002, the DOTD filed a motion to strike and/or dismiss the motion contending that it "should be stricken, dismissed and declared null, void and without effect." In support, the DOTD cited the numerous defects in the motion, which it contended rendered the motion insufficient and without legal effect, including the following: (1) while alleging there is "certain new evidence," the motion failed to set forth the grounds upon which it is based as required by LSA-C.C.P. art. 1975; (2) the motion was not verified by affidavit as required by LSA-C.C.P. art. 1975; (3) the motion was not filed as a contradictory motion as required by LSA-C.C.P. art. 1971 and was not served upon defendant, as service was not prayed for; (4) the motion contained no request for or notice of the time and place of a hearing thereon as required by LSA-C.C.P. arts. 1314 and 1976; (5) the motion was fatally defective in that it did not state what facts the plaintiffs sought to prove by the introduction of the alleged new evidence; and (6) the motion failed to state that plaintiffs had exercised due diligence to produce such evidence at trial.

In the motion to strike, the DOTD requested that the matter be set for a contradictory hearing (and that plaintiffs be served accordingly), which hearing was originally set for December 6, 2002. The hearing was ultimately held on January 21, 2003.

---

[3]Although the trial on the merits had already been held, plaintiffs also filed a document styled "SUPPLEMENTAL MOTION TO CIRCUMSCRIBE DEFENDANTS' EVIDENCE, ETC., AND IN THE ALTERNATIVE (1) FOR SANCTIONS, AND THAT DEFENDANTS BE FOUND IN CONTEMPT OF COURT, (2) FURTHER, TO ORDER COMPLIANACE WITH PLAINTIFF'S DISCOVERY FORTHWITH" alleging misconduct and "broken promises" by the defendants, and seeking to have defendants held in contempt for failure to respond to discovery requests and to have "circumscribed defendants' proof."

The trial court denied this motion as moot.

However, on January 21, 2003, some three years after plaintiffs filed their purported motion for new trial, plaintiffs submitted a document styled "SUPPLEMENTAL AND AMENDED MOTIION FOR NEW TRIAL ON THE 07/10/00 JUDGMENT OF DISMISSAL, RESERVING PLAINTIFF'S RIGHTS TO RECUSE JUDGE DRAKE, AND TO SEEK DISMISSAL OF DUNCAN S. KEMP, III, AS COUNEL FOR RISK MANAGEMENT."[4] The DOTD's motion to strike and/or dismiss the July 18, 2000 motion for new trial, and two recusal motions filed by plaintiffs were heard by the trial court on January 21, 2003. Despite the apparent lack of notice and proper service of the plaintiffs' "supplemental motion," the trial court considered and denied the "supplemental motion" as moot, given its other rulings on January 21, 2003.

In accordance with the court's oral rulings at the hearing, the trial court rendered judgment: (1) denying plaintiffs' motion to recuse filed on July 18, 2000; (2) denying plaintiffs' second motion to recuse filed January 21, 2003; (3) granting the DOTD's motion to strike and/or dismiss plaintiffs' motion for new trial filed on July 18, 2000; and (4) denying plaintiffs' "supplemental and amended motion for new trial" submitted on January 21, 2003. A written judgment in conformity with the court's ruling was signed by the trial court on January 29, 2003.

On March 26, 2003, plaintiffs filed a motion seeking to devolutively appeal from the "judgment of January 21, 2003"denying plaintiffs' motions for new trial and recusal motions. In response to plaintiffs' motion for appeal, the DOTD filed a motion to dismiss the instant appeal, challenging, *inter alia*, the timeliness of the appeal. Accordingly, we first address the DOTD's motion to dismiss.

---

[4]Despite the pending hearing set for January 21, 2003, on January 20, 2003, plaintiffs submitted a faxed copy of the purported supplemental and amended motion for new trial, and notified the clerk of court that an original motion would be submitted within five days.

DISCUSSION

At the outset, we note that in plaintiffs' motion and order for devolutive appeal, plaintiffs contended that an appeal should be granted because the trial court erred in denying their recusal motions at the January 21, 2003 hearing. However, in their brief to this court on appeal, plaintiffs assign error to the trial court's prior ruling at the trial on the merits, i.e., the trial court's granting of the DOTD's motion for involuntary dismissal.

Generally, where it is clear from the appellant's brief that the appellant intended to appeal a judgment on the merits along with a judgment denying the motion for new trial, we will consider the appeal to be an appeal of the judgment on the merits even though the notice of appeal only refers to the judgment denying the motion for new trial.[5] Rao v. Rao, 2005-0059 (La. App. 1st Cir. 11/4/05), 927 So. 2d 356, 360, n.2, writ denied, 2005-2453 (La. 3/24/06), 925 So. 2d 1232. Accordingly, and because appeals are favored, we will consider this case as though plaintiffs intended to appeal from both the July 10, 2000 judgment on the merits as well as the January 29, 2003 judgment.[6] We will address the motion to dismiss as to each of the two judgments separately.

First, with respect to plaintiffs' purported motion for new trial, the record reflects that this "motion" was (and largely remains) defective in the various particulars noted by the DOTD. As shown in the record:

(1) The motion, when filed, was not verified by the affidavit of the applicant in conformity with the requirements of LSA-C.C.P. art. 1975.

---

[5]While the trial court in the January 29, 2003 judgment on appeal (erroneously listed as the January 21, 2003 judgment) **struck** plaintiffs' original purported motion for new trial, it also **denied** plaintiffs' "supplemental and amended" motion for new trial.

[6]Although the denial of a motion for new trial is generally a non-appealable interlocutory judgment, the court may consider interlocutory judgments as part of an unrestricted appeal from a final judgment. Bailey v. Robert V. Neuhoff Limited Partnership, 95-0616 (La. App. 1st Cir. 11/9/95), 665 So. 2d 16, 18, writ denied, 95-2962 (La. 2/9/96), 667 So. 2d 534.

(2) The motion was not a contradictory motion as required by LSA-C.C.P. art. 1971, since the same was not served upon defendants, nor was service prayed for.[7]

(3) No notice of the purported motion for new trial or of the time and place for hearing thereon was served upon defendants as required by LSA-C.C.P. art. 1976.

(4) The motion did not state what facts the plaintiffs sought to prove by the introduction of new evidence.

(5) The motion failed to state that the plaintiffs had used due diligence to produce such evidence upon the trial thereof.

As set forth in LSA-C.C.P. art. 1972, in pertinent part:

> A new trial shall be granted, upon **contradictory motion** of any party, in the following cases:
>
> (1) **When the verdict or judgment appears clearly contrary to the law and evidence.**
>
> (2) When the party has discovered, **since the trial**, evidence important to the cause, which he could not, **with due diligence**, have obtained before or during trial. (Emphasis added).

Moreover, as set forth in LSA-C.C.P. art. 1975:

> A motion for new trial **shall** set forth the grounds upon which it is based. When the motion is based on Article 1972(2) and (3), the **allegations of fact** therein shall be **verified** by the affidavit of the applicant. (Emphasis added.)

The obvious purpose of requiring an **affidavit**, properly **verified** by the applicant, is to present proof of the alleged facts that would entitle an applicant to a new trial on the ground of **newly discovered evidence**. Hyatt v. Hartford Accident & Indemnity Company, 184 So. 2d 563, 569 (La. App. 3rd Cir. 1966). (Emphasis added).

Additionally, LSA-C.C.P. art. 1976 specifically mandates that "Notice of the motion for new trial and of the time and place assigned for hearing thereon must be served upon the opposing party as provided by Article 1314."

After thorough review, we find that the initial "motion" was defective and

---

[7]In fact, plaintiffs specifically requested in writing that the defendant not be served.

insufficient in every possible way. The articles of the Louisiana Code of Civil Procedure applying to motions for new trial are clear and free from ambiguity. McDonald v. O'Meara, 149 So. 2d 611, 614 (La. App. 1st Cir. 1962). Even applying the most liberal construction, the mandates of these articles were not followed in the instant case.[8]

As in McDonald, given the facts of this particular case, we find that to hold that plaintiffs' July 18, 2000 motion for new trial, with its numerous defects, was proper would deprive the DOTD of its "definitive right to a judgment, cause undue delay, and additional time and expense." See McDonald v. O'Meara, 149 So. 2d at 614. To recognize this instrument as somehow constituting a valid motion for new trial would be contrary to the applicable laws and jurisprudence and would serve to create additional procedural problems, as well as create confusion as to the time allowed for taking appeals, and the final disposition of cases. See McDonald v. O'Meara, 149 So. 2d at 614. Thus, we find that the motion for new trial was fatally defective and of no legal effect.

Because we find that plaintiffs' original motion for new trial is null and void and without legal effect, we must further conclude that the delays for appeal of the July 10, 2000 judgment on the merits have run. In so concluding, we note that notice of the July 10, 2000 judgment of dismissal on the merits was issued on July 26, 2000. The delays for applying for a motion for new trial began to run on

---

[8]Further, in the purported "supplemental and amended" motion for new trial, faxed to the clerk of court on the day prior to the hearing on the DOTD's motion to strike, while plaintiffs attempted therein to cure the defects of the original purported motion for new trial, plaintiffs again failed to allege or set forth any new evidence, or factual grounds important to their cause, which they were precluded from obtaining prior to trial. Thus, even as of the time of the hearing on the DOTD's motion to strike, held approximately two and a half years after the filing of the original motion, the defects in the original purported motion had not been cured. Moreover, any attempt to cure the defects, by the filing of a "supplemental and amended motion for new trial" was dilatory and likewise occurred **years** after the original purported motion for new trial had been filed. Cf. McDonald v. O'Meara, 149 So. 2d at 614, where this court previously rejected an attempt to provide a verified affidavit and to cure a failure to request service or to give notice where the attempt was made a mere four months after the filing.

the date that notice was issued. LSA-C.C.P. art. 1974.[9] Plaintiffs failed to file a valid motion for new trial or a motion for appeal of the judgment within the applicable delays. Absent a timely filed and legally sufficient motion for new trial or an appeal taken within the delays provided by law, the judgment dismissing plaintiffs' case by involuntary dismissal at the close of plaintiffs' evidence was a final judgment. Accordingly, we find merit to and grant the DOTD's motion to dismiss the appeal to the extent that plaintiffs are attempting to appeal from the ruling of the trial court in the July 10, 2000 judgment on the merits.

Moreover, absent a timely appeal of the underlying judgment on the merits, there is no jurisdictional basis for appellate review of the January 29, 2003 judgment. See Bailey v. Robert V. Neuhoff Limited Partnership, 95-0616 (La. App. 1st Cir. 11/9/95), 665 So. 2d 16, 18, writ denied, 95-2962 (La. 2/9/96), 667 So. 2d 534. Specifically, we note that all of the rulings contained in the January 29, 2003 judgment are interlocutory in nature. Thus, the January 29, 2003 judgment is not a final and appealable judgment. See LSA-C.C.P. art. 2083. Moreover, we decline to exercise supervisory jurisdiction to review this judgment as plaintiffs failed to assign any error to the rulings contained therein or to brief any issues relative to the January 29, 2003 judgment in their appellate brief.[10] Accordingly, plaintiffs' "appeal" of the January 29, 2003 judgment is also dismissed.

Considering our rulings herein, we deny plaintiffs' motion to supplement the record as moot.

---

[9]Louisiana Code of Civil Procedure article 1974 provides:

> The delay for applying for a new trial shall be seven days, exclusive of legal holidays. The delay for applying for a new trial commences to run on the day after the clerk has mailed, or the sheriff has served, the notice of judgment as required by Article 1913.

[10]Indeed, according to the January 21, 2003 judgment entry, the trial court granted plaintiffs ten days within which to perfect an application for supervisory writs. However, there is nothing in this record relative to any application for supervisory writs related to the hearing of January 21, 2003.

CONCLUSION

For the above and foregoing reasons, the DOTD's motion to dismiss the appeal is granted. Plaintiffs' motion to supplement the record is denied as moot. Costs of this appeal are assessed to plaintiffs/appellants.

MOTION TO DISMISS APPEAL GRANTED; MOTION TO SUPPLEMENT RECORD DENIED AS MOOT.

RINA M. PALMER, CHARLES B.W. PALMER AND CHARLES B.W. PALMER, III

NUMBER 2007 CA 0369

VERSUS

FIRST CIRCUIT

STATE OF LOUISIANA, THROUGH THE DEPARMENT OF TRANSPORTATION AND DEVELOPEMEN, B&C ASPHALT, BRYAN BOSSIER, DIAMOND B. CONSTRUCTION COMPANY, INC. W.R. CORE, INC. AND GARY R. CORE, PRESIDENT OF W.R. CORE, INC.

COURT OF APPEAL

STATE OF LOUISIANA

JCW

WELCH, J., CONCURRING IN PART AND DISSENTING IN PART.

I concur with the opinion insofar as it declines to assert jurisdiction over the January 29, 2003 judgment. However, I respectfully dissent from that portion of the opinion finding that the appeal delay on the July 10, 2000 judgment has run.

I do not believe that the case of **McDonald v. O'Merera**, 149 So.2d 611, 614 (La. App. 1st Cir. 1962) supports the result reached in this case. **McDonald** involved a situation where writs were taken challenging the validity of a trial court's denial of a motion for a new trial based on defects in the motion. **McDonald** did not address the issue of whether a timely, yet defective, motion for a new trial suspends the appeal delays provided for in La. C.C.P. art. 2087. Therefore, I do not believe the case supports the conclusion that a timely, but defective, motion for a new trial has absolutely no effect on the delay for taking an appeal.

Instead, I believe the clear language of the Code of Civil Procedure commands a finding that the appeal of the July 10, 2000 judgment challenging the dismissal of plaintiff's lawsuit on the merits is properly before this court. Because plaintiff filed a timely motion for a new trial from this judgment, the delay for taking an appeal of the July 10, 2000 judgment did not begin to run until the date of the mailing of notice on the trial court's refusal to grant the motion. La C.C.P. arts 2087, 1974. Thus, as long as the timely filed motion for a new trial was

pending in the trial court, the July 10, 2000 judgment could not become final or appealable until January 29, 2003, the date on which the court dismissed plaintiff's motion for a new trial. Plaintiff had 60 days from the mailing of the notice of the court's ruling to appeal the July 10, 2000 judgment, and its motion for an appeal, filed on March 26, 2003, is within that 60-day period. See C.C.P art. 2087.

This conclusion is bolstered by the well-settled principle that appeals are favored in the law, and should not be dismissed unless the ground urged for dismissal is free from doubt. **Fraternal Order of Police v. City of New Orleans,** 2002-1081, p. 2 (La. 11/8/02), 831 So.2d 897, 899. Accordingly, I would deny DOTD's motion to dismiss the appeal challenging the merits of the July 10, 2000 judgment.